



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

September 27, 2005

H.R. 3824

Threatened and Endangered Species Recovery Act of 2005

As ordered reported by the House Committee on Resources on September 22, 2005

SUMMARY

H.R. 3824 would amend the Endangered Species Act (ESA) and authorize appropriations to the Department of the Interior (DOI) and the Department of Agriculture of whatever amounts are necessary to carry out the act through 2010. The bill also would create new financial assistance programs and provide statutory authority for certain other grants and cooperative agreements administered by DOI. The legislation also would increase direct spending by requiring the Secretary of the Interior to pay aid to private landowners who are prohibited from using their property under certain circumstances.

CBO estimates that the U.S. Fish and Wildlife Service (USFWS) and the Animal and Plant Health Inspection Service (APHIS) would spend a total of about \$2.7 billion over the 2006-2010 period to carry out and enforce the ESA as amended by this legislation, assuming appropriation of the necessary amounts. (That total includes spending from funds already appropriated for 2006 and prior years.)

The cost of providing payment of aid to certain land owners is uncertain and would depend on how the legislation would be interpreted by the Administration, private property owners, and the courts. While CBO cannot predict the impact of the aid requirement on the total costs of carrying out the ESA over time, we estimate that federal payments over the 2006-2010 period would likely total less than \$10 million because of likely delays in resolving conflicting interpretations of the law, implementing the necessary administrative mechanisms, and processing requests. The costs of those payments once the program has been fully implemented could be much more significant—despite the likely small size of individual payments—because the volume of requests could be very large at first. After 2010, we expect that such payments would probably average less than \$20 million a year—though annual amounts would likely vary significantly from year to year.

H.R. 3824 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), and would impose no significant additional costs on state, local, or tribal governments. Some provisions in this bill would give state or local governments a greater role in carrying out the Endangered Species Act. Any costs they might incur in response would be incurred voluntarily.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated discretionary budgetary effects of implementing H.R. 3824 are summarized in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By Fiscal Year, in Millions of Dollars					
	2005	2006	2007	2008	2009	2010
SPENDING SUBJECT TO APPROPRIATION						
ESA Spending Under Current Law						
Budget Authority ^{a, b}	358	379	0	0	0	0
Estimated Outlays	340	350	200	100	0	0
Proposed Changes						
Estimated Authorization Level	0	118	614	630	649	668
Estimated Outlays	0	91	354	453	528	600
ESA Spending Under H.R.3765						
Specified Authorization Level ^a	358	497	614	630	649	668
Estimated Authorization Level	340	441	554	553	528	600
CHANGES IN DIRECT SPENDING						
Estimated Budget Authority	0	0	0	0	1	5
Estimated Outlays	0	0	0	0	1	5

- a. The 2005 and 2006 levels are the amounts appropriated for USFWS and APHIS activities authorized by this bill.
- b. Excludes grants to states from the Cooperative Endangered Species Fund because the authority to provide such assistance does not expire under existing law.

Amounts in the table include only the costs of ESA activities carried out by the USFWS and APHIS. H.R. 3824 would not authorize appropriations for ESA programs carried out by the National Oceanic and Atmospheric Administration, which is responsible for protecting threatened or endangered marine species. Also, the activities of other DOI agencies such as

the Bureau of Land Management and the Bureau of Reclamation (both of which incur significant costs to protect endangered and threatened species on lands under their jurisdiction) and the costs of other federal agencies who must comply with the ESA are not included in this estimate.

BASIS OF ESTIMATE

For purposes of this estimate, CBO has assumed that H.R. 3824 will be enacted during fiscal year 2006 and that the entire amounts estimated to be necessary to carry out the bill will be appropriated for each of fiscal years 2006 through 2010. This estimate is based on information provided by the Office of Management and Budget, the Department of the Interior, nonprofit organizations, and various state agencies. Outlays for administrative activities have been estimated on the basis of historical spending patterns for ongoing ESA programs. Spending rates for new assistance programs under the bill reflect expected delays because of the time that would be required to promulgate new regulations and develop administrative procedures.

Spending Subject to Appropriation

The Congress appropriated \$358 million for 2005 and \$379 million for 2006 to carry out ESA activities. CBO estimates that, under H.R. 3824, discretionary funding could rise to more than \$600 million a year.

Administrative Costs. Although authorizations for funding under the ESA expired in 1992, Congress has continued to provide funds each year for programs carried out under the act. For fiscal year 2005, the Congress provided \$234 million for traditional ESA activities and programs carried out by the USFWS.

CBO estimates that the USFWS would need additional funding of \$118 million in fiscal year 2006 and a total of \$2.6 billion over the 2006-2010 period to carry out its responsibilities as the primary agency charged with implementing the ESA (as amended by H.R. 3824). In total, this estimated funding level is more than double the agency's ESA operating budget in recent years. The higher estimated authorization levels reflect the costs of developing and administering new financial assistance programs, modifying USFWS regulatory procedures to incorporate amendments made by the bill, and meeting new planning deadlines. We estimate that funding for APHIS, which helps to enforce the act, would continue at its existing level of roughly \$7 million a year.

The estimated authorization levels for the USFWS include:

- About \$240 million a year to carry out traditional FWS regulatory programs to identify, evaluate, and protect threatened or endangered species, develop and implement habitat conservation plans and species recovery plans, and consult with other federal agencies that carry out, authorize, or fund projects that may affect protected species;
- \$6 million annually for the implementation of the Convention on International Trade in Endangered Species (CITES);
- About \$115 million a year to implement changes to existing ESA programs required by the bill, including costs to incorporate new definitions to be used in USFWS regulatory procedures, expedite the development of recovery plans to reflect new deadlines, and establish new financial assistance programs mandated by sections 9 and 13 of the bill;
- \$2 million in each of fiscal years 2006 and 2007 to create and maintain an online database of ESA information as required by section 14;
- Between \$5 million and \$10 million annually to process requests made by property owners under sections 12 and 13 of the bill. Under section 12, persons whose land may be home to a protected species could request the Secretary of the Interior to provide a written determination that a proposed use of that property would comply with the ESA. The Secretary would have 180 days to make a determination unless an extension is negotiated; failure to do so would be deemed to be an approval of the proposed use. Section 13 would allow property owners to apply for aid to compensate them for the loss of property value if they receive a written determination from the Secretary that a proposed land use would not comply with the ESA; and
- \$1 million a year to compensate landowners for livestock killed by protected species that have been reintroduced to the wild as part of a recovery plan.

Discretionary Grants, Cooperative Agreements, and Other Assistance. H.R. 3824 would authorize the USFWS to provide nonfederal entities with several forms of financial assistance, subject to the availability of appropriated funds. The assistance programs authorized by the bill would provide annual payments to states, local governments, nonprofit organizations, and private landowners who assume conservation and planning responsibilities under the ESA. The bill also would expand the purposes for which state grants from the Cooperative Endangered Species Fund (CESF) may be used.

CBO estimates that the USFWS would need \$240 million annually to fully fund and administer the grant programs and cooperative agreements envisioned by the bill, or about \$140 million more than the amounts appropriated for similar programs for fiscal year 2006.

Direct Spending

Section 13 of the bill would provide an administrative procedure for providing payment of aid to landowners whose use of their property has been restricted by ESA regulatory decisions. CBO expects that enacting this provision would result in new direct spending, but the level of such spending is uncertain. This provision would direct the Secretary of the Interior to make a one-time payment to any landowner who requests aid within 180 days of receiving a written determination under section 12 of the bill that a proposed use of the landowner's property would not comply with the ESA (or that a prior, favorable determination has been withdrawn). The amount of any payment would be equal to the fair market value of the forgone use of the affected portion of the property, as determined by an independent appraisal and taking into account whether or not the proposed use would have been allowed under state and local law. The Secretary would be required to pay the landowner within 180 days of receiving the request or within 180 days of resolving any valuation disputes or other conflicts. Such mandatory payments would increase direct spending costs.

CBO estimates that such costs would likely be small over the next five years—probably less than \$10 million.

This provision would make it much easier (and cheaper) for private landowners to seek and obtain compensation from the federal government by allowing them to request such aid directly from the Secretary rather than filing a lawsuit against the United States (as they must under current law).

In addition to providing an alternative to litigation, the bill would change current law in two important ways that could affect how property owners seek, and how the government pays, compensation. First, the bill would delineate specific standards, definitions, and valuation procedures to be used in determining when and what the government is obligated to pay when its actions under the ESA prohibit the use of private property. Second, the procedure created by section 12 of the bill (to allow property owners to obtain written determinations permitting or rejecting a proposed use of their property) would provide these owners with a definitive agency action that would constitute the basis of a claim for compensation if they still choose to sue.

Compensation under Current Law. Under existing law, persons who wish to seek compensation for property that they believe has been adversely affected by a government action (including administration of the ESA) usually must do so through litigation—generally in the United States Court of Claims.

The process is time-consuming and expensive. In order for a property owner to sue for compensation, he or she must first overcome the costly administrative hurdle of seeking and being denied an incidental take statement or obtaining some other regulatory determination from the government. Property owners who pursue such claims can wait years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds and other valuation hurdles that the landowner must overcome before the courts will award compensation, and the government often appeals such awards. Because the costs of obtaining the necessary permit denial and associated legal costs are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the past decade). Those cases that are brought typically involve relatively large claims (\$100,000 to more than \$100 million) and are usually brought by corporations or other large property owners. Such claims can require more than a decade to resolve. Smaller claims are rarely pursued because small landowners are unable to obtain the necessary permit denials or other agency decisions, cannot afford to sue the government, or would not expect to receive enough compensation to justify the substantial expense of attorneys and scientific experts.

Compensation under H.R. 3824. The creation of an administrative forum would make it much easier for private property owners to seek reimbursement when they are prohibited from using their property as a result of by ESA regulations. Although the number of administrative claims could be quite large at first, CBO expects that relatively few or no payments would be made over the next several years because of the time required to implement the necessary procedures and make other case-by-case determinations. For example, no request could be processed under section 13 until the landowner receives a written determination against his or her proposed use under section 12, and CBO expects that it would take the USFWS one or two years to establish the administrative mechanisms needed to implement section 12 and begin processing the first requests for written determinations. Only then would landowners whose receive notice that their proposed use is prohibited be able to request aid under section 13. Such landowners would likely face similar delays at this stage of the process, especially in the early years of the program, while the agency determines the property interest affected by its earlier decision and the fair market value of that interest.

Once the aid program has been fully implemented, total payments to landowners would almost certainly be greater than the costs of compensating individuals who bring suit under existing law, particularly since there are so few such claims at present). CBO expects that

most aid payments eventually made by the government would be relatively small (often as little as a few thousand dollars) because the vast majority of aid requests would likely involve small parcels of land or some minor fraction (“affected portion”) of larger tracts. However, the agency may face a large volume of requests, at least initially, because the availability of an administrative process would make it economically feasible for small landowners who often cannot afford to sue the government under existing legal avenues to seek compensation.

We expect that it would be difficult for landowners to receive aid for larger claims above \$1 million under the section 13 process because most larger land-use projects would be ineligible to receive written determinations under section 12.

After 2010, CBO estimates that payments would average less than \$20 million a year. Such payments could vary significantly from year to year.

CBO expects that civil litigation would increase as a result of H.R. 3824, at least in the short run, because many requests for aid would likely involve conflicting interpretations of the statute that could require the courts to resolve. Moreover, we expect that smaller landowners who choose to sue the government rather than apply for aid under section 13 would find it easier to do so because they would be able to use the written determination prohibiting their proposed use as a basis for their claims. CBO cannot predict the outcomes of any lawsuits that might be brought as a result. Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 2006-2010 period because claims would take several years to resolve. We expect that the effect on the number of larger claims would be less significant for the same reasons that we expect larger requests for aid to be unsuccessful.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 3824 contains no intergovernmental or private-sector mandates as defined in UMRA, and would impose no significant additional costs on state, local, or tribal governments. Some provisions in this bill would give state and local governments a greater role in carrying out the ESA. Any costs they might incur in response would be incurred voluntarily.

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